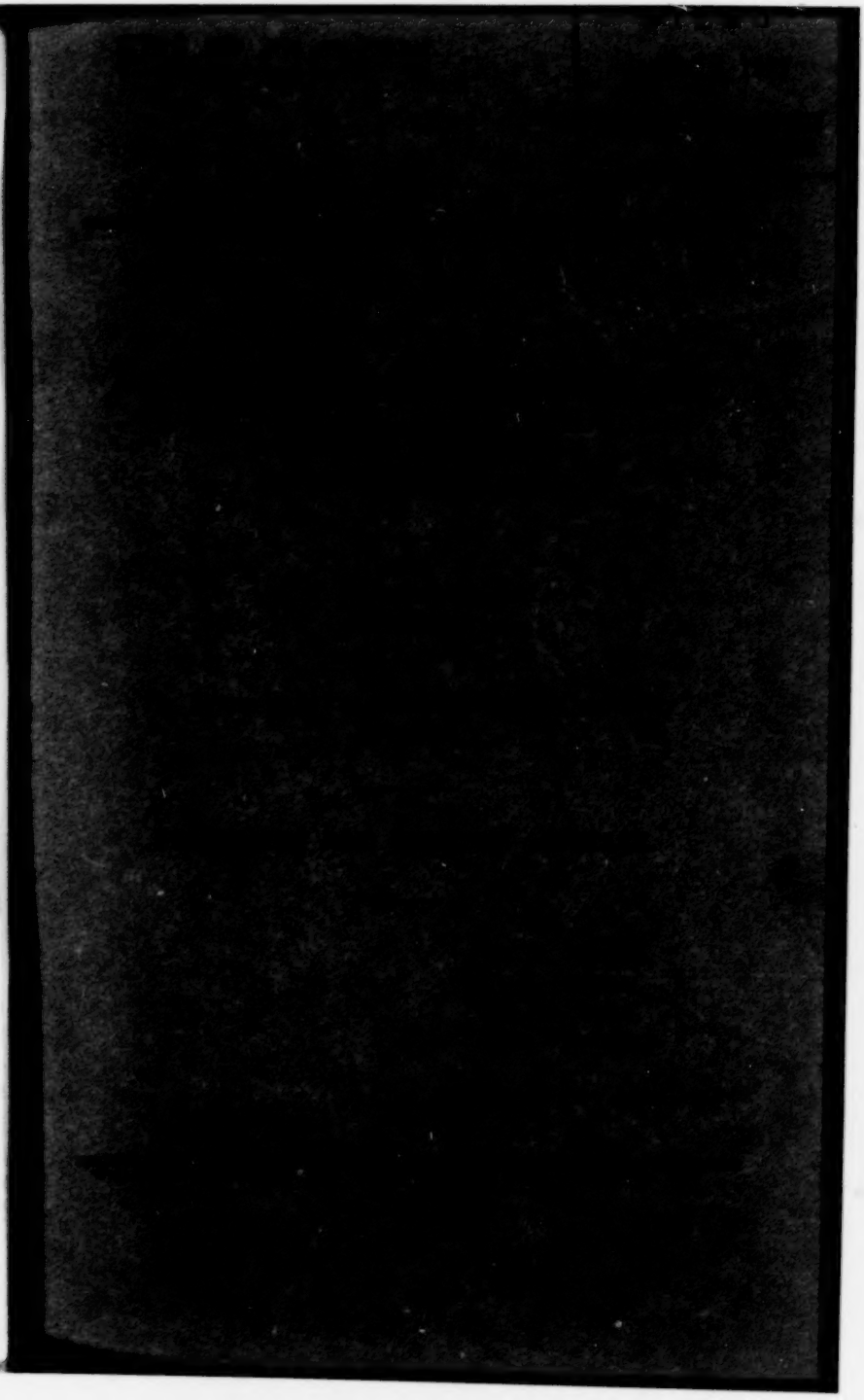

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## TABLE OF CASES CITED

NO. 894

# In the Supreme Court of the United States

OCTOBER TERM, 1926.

J. F. LAWRENCE ET AL.,
*Appellants,*

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
*Appellee.*

## STATEMENT AND BRIEF OF APPELLEE.

We do not think appellants' statement, as contained in counsel's brief is quite sufficient to clearly cover the history and facts of this case as contained in the record. We are therefore, briefly outlining the facts developed by the record, which we think are pertinent to a consideration of the questions involved herein.

### The Act of the Legislature in Controversy.

The sections of the Oklahoma Statutes upon which appellants base the authority and jurisdiction of the Cor-

poration Commission to take the action enjoined by the lower court, are Sections 3482, 3483, 3484 and 3485 of the Compiled Oklahoma Statutes, 1921, and were passed by the 1917 session of the Oklahoma Legislature, said sections read as follows:

"3482. That no person, receiver, firm, company or corporation owning, operating or managing any line of steam railroad in this State shall be allowed to remove railroad shops or division points which have been located at any place in this State for a period of not less than five years without previously securing the permission of the Corporation Commission to make such removal.

"3483. If, and when any such person, receiver, firm, company or corporation desires to remove any such railroad shops or division point described in Section One of this Act, it shall be his duty to file an application with the Corporation Commission setting forth the present location of such shops or division point and the reasons for such removal, and thereupon the Corporation Commission shall have full power and jurisdiction to entertain such complaint, but before hearing the same or making any order permitting such removal to be made, said cause shall be set down for hearing, not less than ten days' notice shall be given the city, town or village in which or at which such shops or division point have been maintained and after giving all parties interested a full and complete hearing in the premises the Commission may in its discretion permit or refuse such request for a removal.

"3484. When an application is filed before the Commission for the removal of terminals or car shops, as provided in Section Two, the Commission

shall hear evidence on the relative efficiency and expense of handling traffic through the proposed terminal as compared with the present facilities, and shall consider all other facts and circumstances affecting the various interests involved. In determining the adequacy of the present facilities the Commission shall consider the same increased by an expenditure equal to an amount necessary to remove the same to the proposed location or an amount equal to the necessary expenditure to establish such facilities at the new location. It is hereby further provided that the Commission shall hear evidence and shall make a finding of fact as to the sanitary and habitable conditions of the proposed location with reference to whether the same would endanger the health of the employes of the applicant or the health of their families. If the Commission should find that the sanitary or habitable conditions at the proposed location of said terminal facilities would endanger or injuriously affect the health of the employes of said applicant or their families, the Commission shall deny said application and order the said terminal facilities and car shops to remain at the present location.

"3485. On any such hearing, as provided in this act, the presumption shall be against the removal and the burden of proof rest upon the applicant to show that such removal ought to be made."

We desire to call the Court's attention to Section 5548 of Compiled Oklahoma Statutes, 1921, passed by the 1907-8 Legislature quoted in our complaint and shown at page 5 of the record compelling all transportation companies, which had established at the time of the passage of said Act, or which might thereafter

establish, round houses or machine shops, to maintain such shops and round houses with sufficient equipment and employes to repair all rolling stock, etc., used within the State. Counsel for appellants, however, say on page 9 of their brief that this Act is not involved in this cause and we, therefore, take it that they concede that if same has the effect of preventing the removal of the shops described in this case, that it is unconstitutional and void.

In this connection attention is called to the fact that this statute has effect of absolutely preventing the removal, at any time, of round houses and machine shops when same are once located. As this act was passed by the Legislature of 1907-8, it shows a willingness on the part of the Legislature of the State of Oklahoma to, by legislation, control the affairs of interstate railroads most intimately and necessarily connected with the management and business of such roads.

## STATEMENT OF FACTS.

### History of Case.

During the month of February, 1917, appellants, J. F. Lawrence and C. C. Taylor, appearing on behalf of themselves and the Chamber of Commerce of the City of Sapulpa and the citizens of the City of Sapulpa, insti-

tuted a proceeding before the Corporation Commission of the State of Oklahoma for the purpose of preventing appellee from removing its division point and shops from the City of Sapulpa. In the complaint filed in said proceeding, said appellants allege that they had been selected by a mass meeting of the citizens of Sapulpa, held on the 3rd day of February, 1917, to file said complaint with the Corporation Commission on behalf of said citizens. Said complaint is set out in the record at pages 44 to 47 inclusive.

At the time of the filing of said complaint, no statute existed in the State of Oklahoma giving the Corporation Commission jurisdiction to prevent a railway company from removing and relocating, at places selected by it, any of its shops or division points. However, the Corporation Commission took jurisdiction of said matter and issued a temporary restraining order preventing such removal.

A partial hearing was had on this complaint and an adjournment taken. During the adjournment, the Legislature of the State of Oklahoma, which it seems was in session at the time the above proceeding was had before said Commission, passed the act in controversy in this case. Whether or not said act was passed for the purpose of particularly applying to the situation at

Sapulpa is not clearly developed by the record. However, the record does show that said act was passed during an adjournment of said case and the provisions of said act were made to peculiarly fit the contention of complainants in said proceeding.

After the passage of said act, no further action was taken in said proceeding before the Corporation Commission until on the 29th day of December, 1926, appellants, J. F. Lawrence and C. C. Taylor, procured another order from said Commission preventing said removal. This order was based upon the former order of said Commission and the Act of the Legislature above referred to. Our complaint was then filed before the United States District Court for the Northern District of Oklahoma against all of the above named appellants praying that they be enjoined from interfering with the removing of said shops and division point for the reason that the Act of the Legislature, under which they sought to act, was unconstitutional and void. After a hearing before a three-judge court, said court held said Act of the Legislature unconstitutional and void and the order complained of by appellants herein was made.

**Definition and Use of Shops and Division Points.**

It is developed by our complaint and the affidavits introduced at the trial, and is, we take it, conceded by appellants that division points are points established by railway companies dividing the runs of their crews and equipment. Through freight and passenger cars are dropped by certain trains and picked up by others at division points. If it is necessary for through freight or passenger cars to lay over or wait for any length of time enroute, this delay occurs and the necessary changes are made at division points. As crews begin and end their runs at division points, and as such runs must constitute a day's work for a crew, then the distances between these points must be governed by the number of hours the crews work daily, the speed of the trains operated, the character of equipment used and the servicable condition of the roadbed over which the trains are operated. As division superintendents and other division officers and employes are appointed for each division, then the number of officers and employes of the railway system are, to a great extent, controlled by the number of divisions created. Thus, it is seen that the location of division points within any one state on such road must co-ordinate with the location of division points on said road in other states throughout the

system. Therefore, it follows that the location of division points on a great interstate railway system, such as appellee, is necessarily a part of the management of the operation of said road, and where the business of such road is largely interstate commerce, the establishment of division points necessarily constitute an important factor in the operation, management and control of the interstate commerce business of such road.

It is equally developed and conceded that railroad shops are located for the purpose of keeping in repair the rolling stock, equipment, etc., used and operated by the railroad company, and as it is necessary for the company to operate its equipment between division points and make necessary changes and repairs of equipment at division points, then it follows that, in nearly every instance, it is necessary for the company's repair shops to be located at division points. When the road is extensively engaged in interstate commerce, the repair shops of such road located at division points are necessarily used for the repair of the company's equipment used in interstate commerce, and are therefore, as much a part of the interstate commerce of such road as are the engines, roadbed and other equipment of said road used in such commerce.

It is further developed, and we take it conceded,

that as the location of division points and repair shops constitute an important factor in the management of the affairs of the company, and as these questions are decided to best facilitate the commerce business of such company with regard to the entire business of said company, including the operation of its through passenger and freight service, then neither the traveling nor shipping public of any particular locality, as such, are in any manner interested in the location of such shops and division points. The location of repair shops or a division point at any particular town, or their removal from that town in no manner affects the shipping or passenger facilities furnished to the inhabitants of such town.

**History and Character of Business of Railway Company.**

About the year 1890, the St. Louis & San Francisco Railroad Company, the predecessor of appellee, built a line of railroad from St. Louis, Missouri, to Sapulpa, Indian Territory. At the time of this construction, there was little development in the Indian Territory so far as white population or white settlements were concerned. When the railroad halted at Sapulpa, it was necessary to provide something in the way of terminal facilities at that point and this was done in a meager way. In 1898, the line of railway was extended in a westerly di-

rection to Oklahoma City. In 1901, a line was built from Sapulpa in a southerly direction across Red River into Texas. After these lines had been built, the shops and other terminal facilities at Sapulpa were gradually increased until they have reached their present size.

In the early history of the railroad, both Tulsa and Sapulpa were small villages. However, beginning about 1905, Tulsa began to show signs of considerable development; especially, from a shipping standpoint. In the meantime, the northern and western portions of Oklahoma Territory had developed and the railroad constructed a line from Tulsa in a northwesterly direction extending through the towns of Pawnee, Perry, Enid, and from Enid in a northerly and southerly direction. The division point of this line was necessarily located at Tulsa. Around the City of Tulsa and along the railway company's line to the northwest, immense oil fields and oil properties developed. The City of Tulsa grew from a small village until at the present time, it is a city of approximately 125,000 people, and has become one of the great shipping centers, if not the greatest shipping center in the State of Oklahoma.

While, on the other hand, the City of Sapulpa never developed to any great extent, either as a commercial center or shipping point; and at the present time, is a

city of only about 15,000 people. The principal railroad business transacted at Sapulpa, has been peculiarly connected with railroad shops and division points and with which the real inhabitants of Sapulpa were not, in any manner, concerned. That is, the business of repairing rolling stock and equipment used by the railroad on its various lines and the business of handling and changing through freight and passenger trains.

It is undisputed that since appellee took over the properties of the old St. Louis & San Francisco Railroad Company, in 1916, it has become a great interstate railroad extensively engaged in interstate business. Undisputed affidavits submitted at the trial show that approximately 85% of the railway company's business passing through, originating and received at the stations at Tulsa and Sapulpa, is interstate in character. That the lines of said railroad extend through Oklahoma, Texas, Kansas, Arkansas, Missouri, Tennessee and other states. That the stations at Sapulpa and Tulsa are located on the main line of said railroad extending from St. Louis, Missouri, to Oklahoma City, Oklahoma, and from Kansas City, Missouri, to Dallas Texas.

**Necessity for Change of Location.**

The records show that at the time the lines of railway under consideration were built into the Indian Territory and the shops and the division points first located, the amount of business transacted was very small in proportion to its present business. That the roadbed at that time was inferior and not capable of sustaining the rolling stock used at the present time. That the engines were light and the motor power of such a character so that it was necessary to change engines and crews often. All of these conditions made it essential that shops and division points be located at a distance of about 100 miles apart. With the old equipment, the speed of the trains was such, that the daily hours of labor of the crews would enable them to travel a distance of about 100 miles. The record shows that since that time the size of the locomotives have been greatly increased. Many useful inventions have made the locomotives more servicable and efficient. The super-heaters, improvements in fire boxes, brick arches, hot water injectors and many other things have made it possible to run engines much further and for a greater length of time, than it was formerly possible. Many changes have been made in the construction of the lines, making it possible to operate efficiently the improved equipment. Heavier steel has been laid,

new bridges have been built, the tracks have been ballasted and put in better condition. These changes have wrought a great revolution in the business of this company. While, under the old system it was only possible to operate the crew and engine a distance of possibly 100 miles, it is now possible, and not unusual, that both freight and passenger trains are operated from four to six hundred miles, without a change of equipment, and crews of course travel much greater distance during their daily hours of work.

Owing to the great volume of interstate business originating at the station of Tulsa and owing to the fact that Tulsa was made the terminal and division point of the railroad extending northwesterly from Tulsa to Enid, it became absolutely necessary to the efficient operation of the railroad's business to establish shops, yards and other terminal facilities at Tulsa. As the business grew these terminal facilities have been increased and expanded, until, within the last few years the shops and division point at the station of Sapulpa have become a great unnecessary and needless expense.

Affidavits submitted at the trial and contained in the record in this case, show by the quotation of items and figures that at least $30,000.00 per month can be saved to the company by eliminating its shops and

division point at Sapulpa and exclusively using those now located at Tulsa, and that the expense of the change would be very meager. See affidavit of F. H. Shaffer, record, pages 37 to 40 inclusive.

This showing was not disputed by appellants' affidavits, except by the opinion of certain parties to the effect that they did not think that the change would effect a saving. The record also shows that owing to the natural conditions existing at Sapulpa, the interstate business of the railroad necessary to be transacted at the railroad shops and division point located in that vicinity, cannot be efficiently transacted at Sapulpa without, at least, the expenditure of an immense sum of money.

**Reasons for This Action.**

The record shows that owing to improved equipment, roadbed, etc., and owing to the increase of the volume of interstate business transacted, that the officers and managers of appellee, having to do with the management of its business after mature consideration and deliberation adopted a general scheme throughout its entire system, extending through many states, of eliminating certain shops and division points and placing those remaining at greater distances apart and increasing the

facilities and efficiency of same, also changing schedules and runs of interstate trains throughout its system in order to meet conditions thus revised, and to more efficiently handle its increased interstate business.

That in order to fit in with and make workable the general scheme of relocating its division points and shops throughout its entire system, and in order to make the distances between the division points located in Kansas and Texas, and those located in Oklahoma uniform with the distances between division points and shops throughout its system, it has become necessary to remove the division point and shops heretofore located at Sapulpa to Tulsa. That appellee was about to carry out the Oklahoma part of the general scheme above described when enjoined by said Commission.

The record further shows that as a part of its said general revision scheme extending throughout the states, through which its lines run, said management on or about the 1st day of January, 1927, prepared and published a train schedule changing the run of certain of its interstate trains operating partially in Oklahoma, by providing therein that the runs of said trains be changed so that same would be from Oklahoma City to Tulsa, from Fort Scott, Kansas to Tulsa, and from Monett, Missouri to Tulsa, and from Sherman, Texas to Tulsa, in-

stead of from Oklahoma City, Fort Scott, Monett and Sherman to Sapulpa respectively, and that the crews on said trains change at Tulsa instead of at Sapulpa. That said change in said schedule was necessary to the carrying out of the general scheme so adopted by the management of said railroad throughout its system and throughout the states of the Union through which its lines extend. That it was the adoption of said schedule and the announcement on the part of said railway company of its intention to put into effect said scheme and said schedule, that caused the last complaint to be filed before the Corporation Commission by appellants, J. F. Lawrence and C. C. Taylor, and that caused said Corporation Commission to issue its last order preventing said change and the removal hereinbefore described.

By reason of the fact that appellee considered the statute upon which appellants' actions as above described were based unconstitutional, unnecessary, discriminatory and void, and that the actions of appellants thereunder constituted an unwarranted interference with the management of appellees' business, and a regulation of and burden upon the interstate commerce business of appellee, this action was instituted.

## BRIEF OF ARGUMENT.

As has been shown by our statement gathered from the record in this cause, the Corporation Commission of the State of Oklahoma, acting under and by virtue of a statute passed by the Legislature of Oklahoma, enjoined the Frisco Railway Company from taking any steps toward moving its division points or shops from the town of Sapulpa, and also enjoined said railway company from putting into effect certain schedules which are a part of a general scheme and plan touching not only transportation of passengers and freight in Oklahoma, but in various other states of the Union through which the line of said railway runs.

The Frisco Railway Company filed its bill of complaint in the United States District Court for the Northern District of Oklahoma, complaining and charging that the Statute of Oklahoma upon which the Corporation Commission based its power to act in the premises was unconstitutional and void for the several reasons named in said complaint. It appears from the allegations of the bill of complaint filed by the railway company, that such railway company is a non-resident of the State of Oklahoma and a resident of the State of Missouri; that it is, in the strictest sense, an interstate railroad, transporting passengers and freight by continuous lines

through several states of the Union. As such non-resident, it appealed to the United States Court, by bill in equity, to restrain the Corporation Commission from enforcing the statute aforesaid, under which it claimed to act, thereby putting in question the validity and constitutionality of said act.

Since the case of *Ex Parte Young,* 209 U. S. 123, 52 L. ed. 714, which held that where the law of a state is unconstitutional on its face, and such law is attacked in the Federal Court for such reason, the Federal Court takes jurisdiction, because it will necessarily be presumed that the law will be enforced and that the party whose rights were to be invaded by such enforcement, need not wait, but can attack the law by a quick application to the Federal Courts, it has been held consistently that a non-resident citizen can go into the Federal Court in the first instance and attack a statute which is unconstitutional on its face. And, indeed, it would seem to be a waste of this Court's time to attempt to establish by reason and authority that no state statute can deprive a non-resident of the right to go into a Federal Court and attack or enjoin the enforcement of a law which is violative of and in conflict with the Constitution of the United States. The question, therefore, is, we respectfully submit, whether the act of the Okla-

homa Legislature under which the Corporation Commission moved and is attempting to move in this cause, is a violation of any constitutional right of the railway company and, therefore, in conflict with the Constitution of the United States.

In passing it may be material to say that more than thirty years ago the Frisco Railway Company entered what is now the State of Oklahoma, under congressional authority, and established a division point or terminal at Sapulpa at that time.

With these preliminary statements we beg now to consider the grounds of unconstitutionality of the statute aforesaid, alleged in our complaint against the Corporation Commission and the other defendants in the cause.

Our first proposition we state as follows:

**The Oklahoma Statute now under consideration is unconstitutional and void because it is an arbitrary and unreasonable exercise of the police power, and this vice appears on the face of the statute.**

The police power of the various states of this Union, the manner of its exercise, and the limitation of its exercise, have been the subject of consideration by this Honorable Court from the beginning of the government. No precise definition of what is designated as police power

has ever been attempted by any court, and whether there has been a proper and lawful exercise of such police power depends always upon the facts and conditions of the particular case under consideration. Whatever may be the origin and source of the police power of any sovereignty, and especially of the states of this Union, it has been distinctly pronounced in practically every state in the Union, by the lower Federal Courts, and by this Honorable Court, that its exercise must be reasonable; that it must not be arbitrary, and that it must have some reasonable relation to the class of subjects included in the police power. The authorities upon this subject have been collated with great care in Sections Nos. 227 and 228 of the 6th volume of Ruling Case Law, and to save time and necessity of quoting at length the cases there cited, we beg leave to quote in full the text. Beginning with the fourth line of Section 227, the text is as follows:

> "The law must tend, in a degree that is perceptible and clear, toward the preservation of the public welfare, or toward the prevention of some offense or manifest evil, or to the furtherance of some object within the scope of the police power. The mere assertion by the legislature that a statute relates to the public health, safety or welfare does not in itself bring that statute within the police power of a state; for there must be obvious and real connection between the actual provisions of a police

> regulation and its avowed purpose, and the regulation adopted must be reasonably adapted to accomplish the end sought to be attained. One application of the familiar rule that the validity of an act is to be determined by its practical operation and effect and not by its title or declared purpose is that a constitutional right cannot be abridged by legislation under the guise of police regulation; since the legislature has no power, under the guise of police regulations, to invade arbitrarily the personal rights and personal liberty of the individual citizen, or arbitrarily to interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations, or to invade property rights."

Again in Section 228, commencing near the top of the page, this language is used:

> "All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public. Accordingly if a restriction or regulation is without reason or necessity it cannot be enforced."

To sustain these different propositions cited in the text above quoted, cases from nearly every state in the Union have been cited, and a close examination of those cases by the writers of this brief, has convinced them that the cases are carefully digested.

We pause here to call attention to and quote from certain leading cases decided by this Honorable Court which laid down the rule with even greater clearness and conciseness than the opinions from the state courts.

We call attention to the case of *Lochner* v. *New York*, 198 U. S. 45, 49 L. ed. 937, where Mr. Justice Peckham, speaking for the Court used this language:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this Court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?
>
> "This is not a question of substituting the judgment of the Court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police

power of the state? and that question must be answered by the Court."

We call attention to the case of *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385. This case is a leading case upon this subject, and has been cited time and again by this Court, and most frequently by the courts of the various states passing upon the limits of the police power. Near the bottom of page 388, Mr. Justice Brown who delivered the opinion of the Court, uses this language:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In this same case Mr. Chief Justice Fuller, on page 391, said:

> "The police power rests upon necessity and the right of self-protection."

Again in *C., B. & Q. Ry. Co.* v. *Illinois*, 200 U. S.

561, 50 L. ed. 596, this Honorable Court speaking through Mr. Justice Harlan, used this language:

> "If the means employed have no real, substantial relation to public objects which government may legally accomplish,—if they are arbitrary and unreasonable, beyond the necessities of the case,—the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action."

Again on page 610 Justice Harlan says:

> "There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored."

We call special attention to the language of Mr. Justice Brewer in his dissenting opinion in that cause, on page 612, not for the purpose of attempting to challenge or weaken the opinion of the majority in that cause, but to bring out, if possible, more clearly limitations upon the police power of the states. Commencing at the bottom of that page the learned Justice said:

> "It seems to me the police power has become the refuge of every grievous wrong upon private property. Whenever any unjust burden is cast upon the owner of private property which cannot be supported under the power of eminent domain or that of taxation, it is referred to the police power. But no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process, and equal protection, nor should it override the demands of natural justice."

We have quoted at some length from these opinions which are, of course, familiar in every detail to this Honorable Court, but which we are compelled to present in order, if possible, to sustain the merit and justice of our contention. We say, therefore, that this statute now under consideration is an arbitrary, unnecessary and capricious exercise of legislative power. To what known and conceded source of the police power can this statute be traced? What public purpose within the purview of the police power is sought to be established and enforced by this statute? It cannot be referred to the police power as to health, because the health either of the employes of a railroad or the public at large cannot be involved in the naked question as to whether or not the railway company ought to move its division points or shops. It cannot be placed upon the morals, or the safety, or the public welfare, because the question as to whether division points or shops shall be moved from one place to another on a railroad line does not and cannot involve, it seems to us, either the question of morals, safety, or public welfare. The truth is, on the very face of things, the location of division points or of shops, is a matter touching the conduct of a railroad's business, and must be confided to the business judgment of such railroad.

Recurring to the language of the adjudications above

cited, does this statute, by its terms, tend, in a degree that is perceptible and clear, toward the preservation of the public welfare? Is it designed to accomplish a purpose properly falling within the scope of the police power? Does it not, on its face, show an arbitrary interference with the right of a railroad company to operate and control its own business? Does it, anywhere, show, on its face, from the most liberal construction that it was enacted for the safety, health, comfort or welfare of the public? Does it not, on its face, show that it is a restriction or regulation without reason or necessity? We, therefore, respectfully submit that this statute under consideration is arbitrary, unreasonable, unnecessary for the promotion of public good or for the protection of public right; that it is an unjustified interference with the right of a railway company so to conduct and manage its property as to best serve the public. If this be true, then such statute is unconstitutional as an unauthorized exercise of police power, and the learned gentlemen who oppose us in this case have attempted to justify this statute solely as a lawful exercise of police power by the state, and, therefore, the question now under consideration is actually at issue in this cause.

Attorneys for appellants in this cause, realizing that the body of this statute cannot be justified on any law-

ful exercise of police power, attempt to save the statute by contending their first proposition, that this act of the legislature is primarily designed to protect the health of railroad employes and their families, and they quote the last provision of the statute, to-wit:

> "That the Commission shall hear evidence and make a finding of fact as to the sanitary and habitable conditions of the proposed location with reference to whether the same would endanger the health of the employes of the applicant or the health of their families."

Your Honors, from reading the whole statute, will see that the portion just quoted has no relation to the question as to whether a removal shall be had, but has relation only to the point to which the removal is made after the Commission has sustained the right to remove. In other words, the first thing to be decided by the Commission, is whether the railway company shall move its division points and shops. It is as to the right of the Commission to determine that question of removal, that we make our attack. On the face of the statute it is clear that the right in the first instance to remove is not to be determined (according to the very language of the statute), by a question of health, a question of morals, a question of safety, or a question of public welfare, but it is only after the right to remove has been granted that the sanitary clause of the statute is considered at all.

And, therefore, it seems to us as stretching credulity too far to say that a sanitary or health provision which relates only to the place to which the removal shall go, saves the whole statute as founded upon a police regulation for the public health. Clearly the question as to whether the railway company can remove from a certain place cannot involve the health of the employes of the community, and it is as against the power of the Corporation Commission to determine, in the first place, whether the railway company shall remove that we center our attack. We contend that when the legislature said to this railway company: "If your division point and shops have been located at a certain place for five years, you must get the permission of the Corporation Commission of this state to move such division point or shops," it was an arbitrary exercise of power by the legislature and an unnecessary exercise of power, not traceable to any legitimate source of the police power. We say that the legislature cannot save such statute by appending to it a sanitary provision with reference to where the division points or shops shall go after removal has been granted, and thereby assert that the whole statute is based upon the police power exercised for the health and safety of the employes.

**The next attack which we make upon said statute is that it is a denial of due process of law and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.**

We believe it is thoroughly settled that a corporation is within the protective terms of said amendment as to due process and equal protection. This being so, this railway company here and now contends that this statute unjustly discriminates between this railroad and other railroads in exactly the same position and engaged in exactly the same business; that a classification has been made which is unlawful, and which violates the Constitution of the United States.

Again we call attention to the substance of the statute. It declares that wherever division points and shops of any particular railroad have been located at a certain place for as much as five years, such railway company cannot move such division points or shops without the consent of the Corporation Commission, thereby leaving all railway companies, whose division points and shops have been located at a particular point for less than five years, free and unrestrained to move without the consent of the Corporation Commission, and to any place they see fit. We realize as to whether the question of classification in a given case is violative of the equal protection of the laws is a difficult one, and has been the

source of much debate and consideration by this Honorable Court, but the general rule which determines such question has been very clearly stated by this Court in numerous decisions. We quote from the case of *Soon Hing* v. *Crowley,* 113 U. S. 703, 28 L. ed. 1145, where Mr. Justice Field, speaking for the Court, said:

> "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then, that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

We beg to cite the case of *State of Iowa* v. *Garbroski,* 111 Iowa 496, and found in 56 L. R. A. 570, with notes, where Justice Ladd in delivering the opinion of the Court, renders a lengthy and very learned opinion, citing cases from other states and from this Honorable Court to sustain it. On page 571 of the case in 56 L. R. A., the Iowa Reports not being accessible to us, that Court said:

> "The extent to which division may be carried without running into special, or what is known as 'class' legislation, is sometimes difficult to determine. All the authorities agree that the distinction in dividing may not be arbitrary, and must be based on differences which are apparent and reasonable. Thus, the Supreme Court of Minnesota, in *Nichols* v. *Walter,* 37 Minn. 264, 33 N. W. 800, declared: 'The true, practical limitation of the legislative power to classify is that the classification shall be upon some

apparent natural reason—some reason suggested by necessity; by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.' This was approved in *Lavallee* v. *St. Paul, M. & M. R. Co.*, 40 Minn. 249, 41 N. W. 974. In *Johnson* v. *St. Paul & D. R. Co.*, 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 157, the same court, through Mitchell, J., said: 'It has been sometimes loosely stated that special legislation is not class, "if all persons brought under its influence are treated alike under the same conditions." But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought "within its influence," but in its classification it must bring within its influence all who are under the same conditions.' In *State ex rel. Richards* v. *Hammer*, 42 N. J. L. 439, the Supreme Court of New Jersey held that 'the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation.' The Supreme Court of Tennessee, in *Sutton* v. *State*, 96 Tenn. 696, 33 L. R. A. 589, 36 S. W. 697, very tersely states the law to be that legislation, to be constitutional and valid, 'must possess each of two indispensable qualities: First, it

must be so framed as to extend to and embrace equally all persons who are or may be in the like situation and circumstances; and, secondly, the classification must be natural and reasonable, not arbitrary and capricious.' "

The Court then cites numerous cases, and after giving such citations, continues:

"In the last case (being the case of *Magoun* v. *Illinois Trust & Sav. Bank,* 170 U. S. 283, 42 L. ed. 1037) Justice McKenna, speaking of the equal protection of the laws required by the 14th Amendment to the Constitution of the United States, said: 'It does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed.' The same Court, speaking through Justice Brewer, in *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150, 41 L. ed. 666, declared that 'the differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations.' "

In this opinion by Justice Ladd, he was considering a statute of Iowa which exempted all persons who had served in the Union army or navy from the provision requiring all persons peddling goods outside of a city or town to pay a license tax. As to this classification, the learned Judge said:

"The classification here attempted rests solely on a past and completed transaction, having no relation

> to the particular legislation enacted. All citizens are divided into two classes,—those who served in the army and navy thirty-five years ago, and all those who did not. True, as suggested, the veterans came from no particular class; but the trouble with this statute is that it attempts to make of them a class in legislation, in the operation of which there can be no substantial distinction between them and others."

In conclusion we call attention to the case of *Gulf, Colorado & Santa Fe Railroad Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666. Mr. Justice Brewer rendered the opinion of the Court in that case, and it is most certainly a powerful and illuminating examination of the question now under consideration. In the body of that opinion, Justice Brewer says:

> "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

And later on, the learned Justice quotes with approval the language of Judge Black in *State* v. *Loomis*, 115 Mo. 307, which is as follows:

> "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a

> reasonable basis for separate laws and regulations. Thus, the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

We think it useless to cite further authorities as to the rule to be adopted in determining when unlawful classification has been made. In the State of Oklahoma there are many interstate railroads. Some of them older, and some younger than the others. The legislature has, by arbitrary action fixed a period of five years under this statute, separating these railroads, placing a burden by virtue of said arbitrary time of five years upon some of these railroads, and leaving the other class unaffected and untouched by said burden. As said by the Supreme Court of Minnesota in the case of *Johnson* v. *St. Paul & D. R. Co.*, 43 Minn. 222, quoted by Judge Ladd in the foregoing opinion:

> "Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions."

All the railroads in Oklahoma do the same kind of business. They carry passengers and they carry freight, and yet if one of these railroads has established its

division point and shops at a given place for a period of less than five years, it need not go to the Corporation Commission to get permission to move these division points, but if it so happens that an older railroad, which has more than five years ago established its division point and shops at a certain place, desires to move, it must get the consent of the Corporation Commission to do so. It seems to us that this is an unjust classification and puts a burden upon some railroads that is not put upon others when all such railroads are engaged in identically ehe same business. However this may be, we feel that we are certainly right that this distinction or classification is purely arbitrary and not based on differences which are apparent and reasonable. It seems to us to be clear that there is not such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.

In this connection, we desire to call the Court's attention to counsel's second point as contained at page 12 of their brief filed herein to the effect that a state may legislate to protect the health of railroad employes, and say that the act in question is a valid exercise of the state's police power by reason of the sanitary provision contained in said act. If the validity of the act in ques-

tion is to depend solely upon the sanitary provision contained therein, then we say the act is discriminatory and void and creates a classification of the railroad employes in the State of Oklahoma so unreasonable and unjustified that it cannot be sustained. The state may legislate to protect the health of railroad employes, but it cannot unreasonably and arbitrarily classify the employes and then legislate to protect only those included within an unjustified and arbitrary classification. If the sanitary provision as contained in said act is depended upon for the validity of said act, then we have legislation that divides railroad shops and division points within the state into two arbitrary classes, to-wit: one class of shops and division points that have been located at given points for five years or more, another class of shops and division points that have been located at given points for less than five years. The act provides that all those shops and division points included within the first class cannot be removed until the places to which they are to be removed are declared, by the Corporation Commission, to be sanitary. All those included within the second class, however, may be removed at will without any supervision from the Corporation Commission. What relation has the period of five years with the effect that an unsanitary locality will have upon railroad employes?

Would it not be just as injurious to the health of those employes engaged at shops which have been located at a place for less than five years to be moved into an unsanitary vicinity as it would be to those employes engaged at shops which have been located at a given point for more than five years? That such a classification is unjustified, capricious, arbitrary and discriminatory, it seems to us, is so clear as to make further argument along this line unnecessary.

**The next attack which we make upon this statute is that the legislature selected an arbitrary point of time, and from that arbitrary point of time changed the rules of evidence, and by reason of such arbitrary point of time so selected, made and declared a prima facie case against removal by the railway company.**

We do not contend of course that ordinarily any citizen has a vested right in the rules of evidence. These rules may be changed to meet given cases, and the conceded existence of one fact may, in proper cases, be made *prima facie* evidence of the existence of a main fact to be proved or determined, but this right of the legislature is not arbitrary, and if the pretended exercise of the right appears clearly to be arbitrary, the legislation cannot stand the test. This doctrine is not new to the courts. This matter is considered and the principal cases dealing with the proposition are cited and quoted

in the case of *People* v. *Mallon*, 222 N. Y. 456, 119 N. E. 102. In that case the Court declared that in the matter now under consideration the true rule is:

> "In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law."

Attorneys for appellants in this cause make little discussion of this proposition, but content themselves with citing *James-Dickinson Farm Mortgage Company et al.*, v. *Harry*, decided by this Court January 10th, 1927, and not officially reported. We submit that this latter case does not control the situation here. The statute considered in this last case was one to protect the people of the state against fraud, and this is one of the most ancient sources of the police power. It was contended in that case that the statute violated the due process clause of the 14th Amendment, in providing that whenever the kind of promise appearing in that case has not been complied with by the party making it within a reasonable time, "it shall be presumed that it was falsely and fraudulently made, and the burden shall be on the party making it to show that it was made in good faith but

was prevented from complying therewith by the act of God, the public enemy, or by some equitable reason."

Here, there was a clear rational relation between the failure to keep the promise and the fraud inhering in its making, which was the ultimate fact to be found. The learned Justice used this language:

> "It is well settled that a state may consider proof of one fact presumptive evidence of another, if there is a rational connection between them,"

and the learned Justice cited the case of *Hawes* v. *Georgia*, 258 U. S. 1, 66 L. ed. 431. In that case Mr. Justice McKenna used the following language, and by an application of this language to the case at bar we cannot escape the conclusion that this arbitrary presumption, raised in this statute by reason of a certain point of time, denies to certain railway companies the equal protection of the law under the Fourteenth Amendment:

> "In *Hawkins* v. *Bleakly*, 243 U. S. 210, 61 L. ed. 678, it is said: 'The establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law.'
>
> "Undoubtedly there must be a relation between the two facts. That is, if one may evidence the other, there must be connection between them,—a re-

quirement that reasoning insists on, and, necessarily, the law."

Again Justice McKenna in the same case says:

"We agree, therefore, with the Supreme Court of the state, that the existence upon land of distilling apparatus, consisting of the still itself, boxes and barrels, has a natural relation to the fact that the occupant of the land has knowledge of the existence of such objects and their situation."

Testing this statute by these rules and observations laid down by Justice McKenna, can anyone say that there is a rational relation between five years' occupation and the right to remove? What has the period of occupation to do with this right to remove? By what course of reasoning can we say that five years' flat raises a presumption against the right to remove, but four years, eleven months and twenty-nine days raise no such presumption? Why is not the point of time selected as a basis for changing the rules of evidence and fixing a presumption against removal, purely arbitrary and capricious? This Honorable Court and many of the courts of the Union, as we shall show under another subject in a later portion of this brief, have held that although a railway company may make a contract to locate shops or division points perpetually at a given place, such contract is opposed to public policy. An injunction will not lie to prevent

the railway company from moving such division points or shops, especially where the railway company has remained there for a reasonable length of time.

In the celebrated case of *Texas & Pacific Railway Company* v. *Marshall*, 136 U. S. 393, 34 L. ed. 385, this Court, speaking through Mr. Justice Miller, said that six years was a reasonable time. This case and all cases of a kindred character, were based upon the salutary proposition that a railway company owes its highest duty to the public, and next to that, to its stockholders, and if ever the exigencies of the public require a change in division points and shops, all private claims and rights must yield to such exigencies. It would, therefore, seem to follow that the longer a railway company had occupied a given place with its division points or shops, the more certain it would be that exigencies would arise which required a removal in the interest of the public. Therefore, the presumption, if any existed at all, would be in favor of removal rather than against it. Here the legislature reverses the presumption of continued occupation and emphatically and arbitrarily declares that five years' occupation raises a presumption against the right to remove, and makes a *prima facie* case in favor of the state. Justice McKenna said that the selection of one fact as *prima facie* proof of another, makes, necessarily, the se-

lected fact evidence the existence of the other ultimate fact, and he says there must be some rational connection between them. He further says that the requirement that this rational relation must exist, is demanded by reason and, necessarily, by the law. The legislature has declared when a railway company has established its division points or shops at any place for five years, that this five years bears a rational relation to the question as to whether removal shall be granted by the Corporation Commission. We say that there is no rational relation between them, and that it is a waste of the time of this Honorable Court to argue that five years' occupation by the railway company of a given place for shops and division points, has anything, even remotely, to do with the question as to whether or not, under all the circumstances of the case, a railway company has a right to remove such division points or shops.

We, therefore, respectfully submit to the Court without extending this argument, that the arbitrary period of five years, as fixed by the legislature in this statute, has no rational relation to the question as to whether or not the railway company shall be permitted to remove. Having no such rational relation, the statute must fall.

The three points which we have discussed in the foregoing argument, raise questions which are neither

technical nor frivolous. There has never been a time or a case in the history of this Court when propositions like the foregoing have not received its most careful consideration, because, as said by Mr. Justice Brewer for this Court in the case cited above, no duty is more pressing upon this great Court of last resort than to see that the equal protection of the laws and due process of law shall be maintained throughout this Union. If a police regulation is arbitrary, oppressive, or capricious, not traceable to any known source of police power for the public welfare in some way, it offends against the Constitution. If, in the exercise of the police power, the legislature has made an artificial and unreasonable classification, thereby giving to some persons in one class rights and privileges not accorded to persons in the same class, such exercise of power offends against the Constitution. If the legislature, in the pretended exercise of its police power, arbitrarily selects one fact as *prima facie* evidence of another fact, thereby changing the ordinary rules of evidence common to all citizens, such accepted fact must bear a rational relation to the fact to be proved, and if it does not, this offends against the Constitution. It is not often that a state statute is open to all these objections. It is clear, from a consideration of this whole record, that this statute was passed

hastily and without due consideration, and to meet conditions such as the legislature thought existed at Sapulpa. The statute was passed while the Sapulpa litigation, before the Corporation Commission, was pending. Proof had been made at the hearing before the Commission by the inhabitants of Sapulpa, as shown by this record, that West Tulsa, the place to which the railway company desired to remove its shops from Sapulpa, was unsanitary, and it is fair to assume that this very litigation, and the facts there proved, influenced the passage of the statute now under consideration. It cannot be said that if the legislature had in view when it passed such statute, the purpose of protecting the inhabitants of the particular town in question, who had built and acquired property with reference to the location of division points and shops, that this was a purpose justifying the exercise of the police power, because the inhabitants of a particular town cannot possibly have any vested right in the continued occupation of certain portions of the town by a railway company for shops or for the establishment of division points.

The Supreme Court of Oklahoma has frequently held that the increase or decrease in property value caused by change of location or abandonment of depots, yards, shops and other facilities, are not matters which can be

considered as affecting, in any way, the right to make such changes; that public convenience, sufficient accommodations and sufficient facilities, as those terms must be used with relation to the requirements of a public service corporation, mean conveniences, etc., with relation to the business of a common carrier on the part of the railroad using public.

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *State,* 31 Okla. 509, 122 Pac. 217, Justice Dunn, speaking for the Court, said in the body of the opinion:

> "Railroad depots and their locations are public facilities for the use and convenience of the people having business to transact with the companies and the wishes of other people or the fact that they purchased property in reference to the location of the depot is absolutely of no consequence whatsoever in locating or relocating it. No property owner can acquire a vested right in the location of a depot, and as these considerations were the primary ones affecting the action of the commission in this instance, and not being competent to be considered, they must be eliminated from the case, leaving alone what the commission concedes should outweigh any others advanced."

Again in *Wharton* v. *Miller,* 33 Okla. 771, Justice Williams, now Federal Judge of the Eastern District of Oklahoma, speaking for the Oklahoma Court, said:

> "The fact that the construction and maintenance of the station at W. may have the consequential or incidental effect of building a town at that point and

> retarding the growth of adjacent towns at stations B. and M., and thereby causing the depreciation of property located in said towns, is not a sufficient legal reason for parties interested in property located in either B. or M. to complain at the parties residing at W. being afforded all reasonable facilities, conveniences, and service as patrons of such public service corporation at said station."

Again in *Missouri, O. & G. Ry. Co.* v. *State,* 53 Okla. 341, 156 Pac. 1155, Chief Justice Kane speaking for the Court said:

> "The location of a railway station, of course, belongs to the public duties of the commission, when the question is, whether its location at a certain point is for the benefit and interest of the traveling or railroad using public. If, however, these considerations are ignored, or, if considered, are held to be subordinate, and other elements are considered as paramount, which are aside from either the public duty or the interest of the traveling or railroad using public, or the necessities of the operation of the railroad, then an order made with the latter for a basis must be held to be unreasonable and without legal sanction."

And this we claim is the real "meat in the cocoanut." An inspection of this statute and the circumstances surrounding its passage discloses that the legislature did not have in mind, when it enacted such statute, the question of service to the patrons of the railroad, the shipper and the traveler; that it did not have in mind the welfare of such people who had business with the railroad; that it

did not have in mind the welfare of the employes of the railroad so far as the right to remove was concerned, but must have had in mind, in a large degree, the rights of the inhabitants of the town, in a property sense, which can never be taken into consideration, as shown by the Oklahoma cases above cited, as a basis for denying removal of division points, etc.

**Our last contention is that the statute now under consideration is an attempted regulation of interstate commerce, is a direct burden upon interstate commerce, and interferes directly with interstate commerce.**

We now come to the consideration of our last proposition which covers a much wider field than the propositions heretofore discussed, and is more difficult of solution, not because the general rules applicable to the subject to be discussed have not been clearly formulated and pronounced by this Honorable Court, but because of the great number of cases upon this subject and because the law attacked in each case is made to depend almost invariably upon the subject matter which the State Legislature has considered, and the extent to which the state, in acting upon such subject matter, has attempted to regulate or interfere directly with interstate commerce. We contend that the statute which we are attacking in this cause is, on its face, an attempted regulation of interstate commerce; that in its necessary operation it will

seriously interfere with interstate commerce; that if sustained, it amounts to state operation of the railway's business, and that, therefore, this state statute is in the "teenth" of the commerce clause of the Constitution. It would be almost an affront to this Honorable Court to take its time to discuss the origin of this commerce clause of the Constitution, its necessity and the salutary effect it has had in the protection of property and business within the confines of the American Union. We do know that, in its very essence and purpose, it is a limitation upon the police power of the states. It was intended to make commerce between the states and foreign nations free and untrammeled, subject only to the controlling and regulating power of the National Government. It is not denied by us, and it cannot be denied, that under many decisions of this Court police regulations of a state, with reference to interstate railroads, have been sustained and will be sustained, and this is so even though Congress has passed no legislation with reference to the subject matter, but the rule is, and has always been, that the state statute in question must be necessary; that it must serve some public purpose within the reach of the state through its police power, and that under the guise of police power the state can never be permitted to regulate, in the least degree, interstate commerce or to place

a direct burden upon the same. It is obvious, therefore, that every state statute under consideration by this Court, as to whether it was a valid exercise of the police power of the state, considering its operation and effect as against the commerce clause of the Constitution, will depend not only upon the language of the law but the subject matter covered by the law, and the relation of that subject matter to interstate commerce.

This Oklahoma statute confers the power upon the Corporation Commission of the state to determine whether a railway company, largely interstate in its character, and doing largely interstate business between many states, shall change its division points from one place to another on its line, or its shops from one place to another on its line. It becomes necessary, therefore, to consider the subject matter of this legislation and its relation to interstate commerce as such. It is pertinent, therefore, to inquire what division points are; what they mean to an interstate railroad, and what part their locations play in the movement of interstate commerce and in the successful conduct of the railway's business in the interest of the public and of the stockholders of the road.

In our complaint filed in the Federal Court in this case, we set up that this statute fetters and interferes with interstate commerce of the Frisco Railroad; that it

is, in effect, a regulation of the commerce of that road, and a direct interference with such commerce, and we took affidavits from various officials and employes of the road to ascertain just what division points are; what is their purpose and meaning, and what part they necessarily play in the interstate business of a railroad. It was established, and not denied by appellant at the hearing before the Three Judges, that the creation of division points along the line of an interstate railroad was primarily for the purpose of increasing the facilities for handling interstate and intrastate commerce; that division points are established at one place or the other, according to the necessity of traffic, and for the purpose of facilitating that traffic; that a division point established one year may not be the proper division point the following year; that, in early days, division points were more numerous and closer together by reason of the inferiority of the motive power and tracks, but in modern days, by reason of improved trackage and improved motive power, division points are constantly lengthened, and an effort is made wherever possible, in the interest of economy, to abandon as many division points as practical; that division points are never made for the convenience, of either the passenger or the shipper, but for the purpose of facilitating the commerce coming to the

railroad; that the shipping public is constantly demanding better service and more dispatch in the movement of freight, and that the traveling public is demanding faster trains and fewer stops in order that they may reach the busy centers on interstate railroads, and that in order to satisfy this growing demand of the traveling and shipping public, great competition has arisen between railroads, and, therefore, it is necessary for any particular railroad to meet these demands in order to hold its business. It was also shown that if a division point is no longer practical from a standpoint of business or economy, or from a standpoint of quick service, great confusion will result in the management of trains; great delays will occur in the movement of freight and passengers if the company is not permitted to select the points at which it will establish divisions, or is not permitted to leave a point where a division has been established, and it was also shown that a large percentage of all cars moving on this railway company's line are interstate commerce; that the shops are a necessary incident to interstate commerce in order to keep the equipment in proper condition to move the cars, and in the natural course of things must, in nearly every case, be located at division points; that neither the traveling public nor the shipping public, nor those who have busi-

ness with the railroad, are affected one way or the other either by the location of division points or the location of repair shops; that the public convenience is in no way served by such locations, but they are located primarily and purposely as necessary instrumentalities in commerce in order to make possible proper and efficient movement of that commerce. It was shown that by reason of the great increase in motive power and improvement in trackage, the employes of the railway company can go a greater distance in the same length of time than they could go under the old instrumentalities; that it is unnecessary to change crews on these interstate trains as often as under old conditions; that, at division points, crews generally are changed, engines are overhauled and frequently changed; that all these things create delay in transportation, and, therefore, the less division points the less delay on this account as to passengers and freight; that inasmuch as this particular railway runs its trains by continuous passage through many states of the Union, it is necessary to adjust its division points in each state to serve *through transportation*, and that this was a matter which required the judgment of experienced railroad men, familiar with the business of the road, familiar with its obligations to the public and familiar with the demands of the public.

It was shown that the division point at Sapulpa was established more than thirty years ago. At that time the Frisco Railroad was just entering the Indian Territory, and for many years Sapulpa was the end of the terminus of the line, and that for that reason it was natural and practical to establish a division point at Sapulpa, but that since then the population through which the railroad runs has vastly increased, and that the business interests of the country have very much expanded; that large cities have grown up on the line of the railroad; that Tulsa is now a city of more than 100,000 people, and only fourteen miles from Sapulpa, and that Oklahoma City, located on the line of said railway, is only about one hundred miles distant from Sapulpa; that the change in population, change in volume of the road's business, and the growth of cities—all these things have made it absolutely necessary, in the efficiency and economy of the service, to readjust division points to abandon some and acquire others, and that these changes in conditions now make it imperative that the railroad company move its division points from Sapulpa, and that the holding of the division points and shops at Sapulpa will result in great loss annually to the railway company, which loss is stated in exact figures and terms.

In the examination of this statute it becomes neces-

sary carefully to examine the subject matter of this legislation. It is not denied that in a proper case a state may pass a valid statute, affecting an instrumentality of interstate commerce, provided such instrumentality is not so necessary a part of interstate commerce and so intimately connected with the commerce itself as to be a part of that commerce. Of course, if the state statute touches directly interstate commerce, it falls, because whether Congress has acted or not, the state cannot regulate commerce as such, nor can it fetter or interfere with, in an unreasonable degree, that commerce, because a decided interference with interstate commerce by interfering with an instrumentality of commerce, is just the same as if the state had attempted, in express terms, to regulate that commerce. If the state statute acts upon commerce itself, it cannot stand. If it acts upon an instrumentality of commerce in such a way as to interfere directly with that commerce, the act still cannot stand.

From the statement of facts above mentioned, which is conceded, we think, to be accurate in this case, division points must be selected with great care. They must be selected so as to co-ordinate and be in just accord with division points established in the other states through which the railroad runs. Division points and shops which are incidental thereto, are not like an engine or the track upon which the engine runs, but their relation

to the commerce is more intimate, more comprehensive, and they are, indeed, it seems to us, an integral part of the commerce itself. We contend, therefore, that the subject matter of this legislation is so far a part of the commerce of the country, and so thoroughly enters into the life of that commerce and the discharge of the railway company's duty to the public, as to be beyond the power of the state to be considered as a proper subject of legislation, or regulation or of control. These division points and shops are more than mere naked instrumentalities of commerce, and any interference by the state or any power given to a state agency to interfere with the location of division points or shops, must be a direct interference with the interstate commerce of the railway company, and this apart from another vital question in this case, which we shall discuss later, that the state cannot operate a railroad against the consent of the railroad; that a railroad is private property, and the railroad company must, in the very essence of things, be left to manage its own property for the best interest of the public and the stockholders.

We now beg to cite some of the adjudications of this Honorable Court upon these questions. We shall make the citations as brief as possible, placing these cases in juxta-position in order to show the different

utterances of the Court, and to find, if we can, from these decisions an established rule which will solve the question now under consideration.

In *Hannibal and St. Joseph Railroad Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527, fifty years ago Mr. Justice Strong, speaking for the Court, said:

> "It may not (meaning the state) under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Upon this subject the cases in 92 U. S., to which we have referred, are very instructive. In *Henderson* v. *Mayor, etc.*, the statute of New York was defended as a police regulation to protect the state against the influx of foreign paupers; but it was held to be unconstitutional, because its practical result was to impose a burden upon all passengers from foreign countries. And it was laid down that, 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' * * * These cases, it is true, speak only of laws affecting the entrance of persons into a state; but the constitutional doctrine they maintain are equally applicable to interstate transportation of property. They deny validity to any state legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the federal government."

Again in the latter part of the opinion Mr. Justice Strong uses this language:

> "Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire

whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature and not for the courts. With this we cannot concur. The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

Testing the legislation now under consideration by these rules, has not the statute gone far beyond its apparent object, and far into the realm which is in the exclusive jurisdiction of Congress? That it interferes with the commerce of the road, no argument seems necessary, and that there was no reasonable ground for the exercise of this particular power by the legislature equally appears.

In *Crutcher* v. *Commonwealth of Kentucky,* 141 U. S. 47, 35 L. ed. 649, Mr. Justice Bradley said:

"To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on

their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.

"It has frequently been laid down by this Court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce."

Again in the same opinion he says:

"But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the state. But it does not follow that everything which the legislature of a state may deem essential for the good order of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce."

In *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, 54 L. ed. 355, this language is used:

"But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This Court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

Again in *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543, 50 L. ed. 1142, Mr. Justice White, speaking for the Court, said:

> "Without at all questioning the right of the State of North Carolina, in the exercise of its police authority, to confer upon an administrative agency the power to make many reasonable regulations concerning the place, manner, and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subject made by the state, or under its authority, which directly burdens interstate commerce, is a regulation of such commerce, and repugnant to the Constitution of the United States." * * *
>
> "The direct burden and resulting regulation of interstate commerce operated by an alleged assertion of state authority similar in character to the one here involved was passed upon by the Circuit Court of Appeals for the Sixth Circuit in *Central Stock Yards Co.* v. *Louisville & N. R. Co.*, 55 C. C. A 63, 118 Fed. 113. The Court in that case was called upon to determine whether certain laws of Kentucky imposed a direct burden upon interstate commerce and were a regulation of such commerce, upon the assumption that those laws compelled a common carrier engaged in interstate commerce transportation to deliver cars of live stock, moving in the channels of interstate commerce, at a particular place beyond its own line, different from the general place of delivery established by the railway company. In pointing out that, if the legislation in question was entitled to the construction claimed for it, it would amount to a state regulation of interstate commerce, it was aptly and tersely said:
>
> " 'It is thoroughly well settled that a state may

not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the states. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one state to be delivered to another at a particular place and in a particular way. If the Kentucky Constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do.' "

In the same case Mr. Justice White said:

"Viewing the order which is under consideration in this case as an assertion by the Corporation Commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right of way and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce. On the other hand, treating the order as but the assertion of the power of the Corporation Commission to so direct in a particular case, in favor of a given person or corporation, the order not only was, in its very nature, a direct burden and regulation of interstate commerce, but also asserted a power concerning a subject directly covered by the Act of Congress to regulate commerce and the amendments to that act, which forbid and provide remedies to prevent unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce."

In *Michigan Public Utilities Commission et al.* v. *Duke*, 266 U. S. 570, 69 L. ed. 445, the United States Su-

preme Court had to deal with what is known as Act 209 of the Public Acts of the State of Michigan, which imposed certain penalties upon plaintiff, who, under contracts with certain business firms, was transporting automobile bodies from Detroit, Michigan, to Toledo, Ohio. The act attempted to be enforced against the plaintiff provided that those similarly engaged in said state should furnish an indemnity bond conditioned upon the payment of all just claims and liabilities resulting from injuries to persons, property, etc., by reason of such business. The Supreme Court in that case said:

> "A state has no power to fetter the right to carry on interstate commerce within its borders by the imposition of conditions or regulations which are unnecessary and pass beyond the bounds of what is reasonable and suitable for the proper exercise of its powers in the field that belongs to it."

Again in *Lochner* v. *New York*, 198 U. S. 45, 49 L. ed. 937, which has already been quoted under another proposition, it is said:

> "In every case that comes before this Court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary intereference with the right of the individual?" * * *

We again cite a few lines from the decision of Mr.

Justice Brown in the case of *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

And we recur again to the declaration of Mr. Justice Butler in the case of *Banton* v. *Belt Line Ry. Corporation*, 268 U. S. 413, 69 L. ed. 1020, as follows:

> "Appellee's property is held in private ownership; and, subject to reasonable regulation in the public interest, the management and right to control the business policy of the company belong to its owners."

A careful examination of the rules laid down in these various cases to determine whether or not a state statute, such as the one now under consideration, is valid, will discover, we think, that the statute under consideration is unique and extraordinary, both in the character of language used and the undisclosed purpose for which

it was enacted. It is settled by the decisions above quoted that, in order to make this statute a valid exercise of police power, it *must be necessary;* it must be passed to serve some definite *public purpose* within state police power; it must not be arbitrary; must not seriously interfere with the management of private business, and it must not trench, in any way, upon the commerce power of Congress. We say, with great respect, that this statute is wholly unnecessary; that it does not serve any great public purpose; that it does not serve the public in its relation to railway companies; that it does not serve the employe in relation to railway companies; that it does not serve the shipper or the passenger, but can only, in its necessary operation as a practical piece of legislation, serve to benefit the inhabitants of a particular place, who have perhaps expended money and erected property on the faith of the location of a division point or shops at a particular place; that it is an attempt to interfere with the business of the railway company; that it is an attempt to regulate certain portions of that business which enter into the obligations of interstate railway companies to the public; that it is a subject matter, in its very nature, with which the state has no right to deal; and the above cases further emphasize the proposition that any act of a state legislature which *interferes*

*in a pronounced degree with interstate commerce*, is, in effect, a regulation of that commerce; that any state statute which fetters interstate commerce or which, in its necessary operation, fetters that commerce, is an invalid exercise of state power. A direct burden on interstate commerce or an unwarranted interference with interstate commerce, created and committed by a state, is *the equivalent of a regulation of* commerce which is exclusively within the domain of federal power. We cannot see how a trained mind, seeking rational conclusions from established facts, can reach a conclusion that this particular statute does not interfere seriously with interstate commerce; that it does not burden interstate commerce, and, therefore, that it is not a regulation of interstate commerce.

Cases distinctly analogous to the case at bar have been considered by this Court, and we beg now to cite some of those cases.

In *Mississippi R. Commission* v. *Illinois Central R. Co.*, 203 U. S. 335, 51 L. ed. 209, this Court was considering the validity of an order of the Mississippi Railroad Commission requiring a railway company to stop its interstate mail trains at a specified county seat where proper and adequate facilities were otherwise afforded

that station, and speaking through Mr. Justice Peckham, said:

> "The order cannot be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes, as asserted. It is the question whether these trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such train station. If the commission can order such a train to be stopped at a particular locality under such circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined and the train turned from a through to a local one in Mississippi. The Legislature of a state could not itself make such an order, and it cannot delegate the power to a commission to do so, in its discretion, when adequate facilities are otherwise furnished.
>
> "The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between states, both of passengers and freight. A wholly unnecessary, even though a small, obstacle, ought not in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals."

Why, may we ask, was the statute there held invalid? It was because, in its necessary operation and application, it interfered with interstate commerce; it interfered with the time to be made by the railway com-

pany; it interfered with the quick delivery of passengers and freight to given points on that interstate railroad; it prevented the railroad from meeting the competition of its rivals, and such a provision was wholly unnecessary if local facilities were furnished. If there is no power on the part of a state to require an interstate train, carrying the United States mail, to stop at a given point because of an unnecessary burden upon interstate commerce, how much less warrant there seems to be for the state to assume to determine where a railway company shall place its division points and its shops. It seems to us that the interference by a state with the time to be made by an interstate train is very much less in gravity and in scope than the interference of a state with the establishment by a railway company of division points and shops.

In *Southern Railway Co.* v. *King*, 217 U. S. 524, 54 L. ed. 878, which involved a statute regulating the approach of interstate trains to dangerous crossings, signals to be given, etc., Mr. Justice Day said: :

> "It is consistent with the former decisions of this Court, and with a proper interpretation of constitutional rights, at least, in the absence of congressional action upon the same subject matter, for the state to regulate the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train

> which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such train to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the state to enact."

The constitutionality of this particular statute was sustained, but the observation of Mr. Justice Day above quoted show that this statute went to the very limit of police power; that such unusual and necessary requirement wth reference to the speed of trains would be a direct burden upon interstate commerce.

Mr. Justice Holmes and Mr. Justice White dissented in that case. Mr. Justice Holmes used this language on page 874:

> "It seems to me a miscarriage of justice to sustain liability under a statute which possibly, and I think probably, is unconstitutional, until the facts have been heard which the petitioner alleged and offered to prove. I think that the judgment should be reversed."

Again in *Illinois Central R. Co.* v. *People of Illinois*, 163 U. S. 142, 41 L. ed. 107, it is said:

> "A state statute requiring a fast mail train carrying interstate passengers and the United States mail over an interstate highway established by authority of Congress, to delay the transportation of such passengesr and mails by turning aside from the direct interstate route, and running to a station 3½ miles away from a point on that route and back again to the same point, because such station is the county seat, for the interstate travel to and from which the railroad company furnishes other and ample accommodation, is an unconstitutional interference with and obstruction of interstate commerce and of the passage of the mails."

We respectfully submit, therefore, that the difference between an effort on the part of the state legislature to stop interstate trains at given points differs not in principle, but only in degree, from its asserted power to authorize a state agency to determine whether a railway company shall move its division point or shops, the latter power asserted being much more direct in its movement against the commerce power of the National Government than the former. If the legislature has the power to confer by statute upon a Corporation Commission the right to pass upon whether a railway company shall move its division point or shops, it would follow that it would have the same right to confer upon that commission the power to say at what point the railway company

shall originally establish its division point or shops, thus taking away from the railway company, undoubtedly, the power best to manage and conduct its business in behalf of the public and its stockholders.

In each of these latter cases Your Honors will take notice that if proper local facilities were furnished by the railway company, the argument was at an end. In this case it is shown by affidavits that proper facilities for serving the shipping and traveling public, for serving the patrons of the road, and for serving the people of Sapulpa, as patrons of the road, will be left after the division points and shops are moved. If service in the furnishing of facilities by a railway company at the points where the legislature seeks to stop interstate trains, is the answer to any attempted exercise of such power by the state, then certainly if reasonable facilities for service are left by a railway company at a place from which it desires to remove its division point and shops, the lack of power on the part of the legislature to touch this question at all is equally apparent. It is not questioned in this case that the removal of the shops and division point from Sapulpa will still leave ample railroad facilities to fulfill every duty which the railway company owes to anybody at that particular place, and the remark of Mr. Justice McReynolds in *St. Louis &*

*San Francisco Ry. Co.* v. *Public Service Commission of Missouri,* 254 U. S. 535, 65 L. ed. 389, becomes of tremendous importance in considering this view of the subject. The learned Justice said:

> "The fact of local facilities this Court may determine, such fact being necessarily involved in the determination of the federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce by imposing an arbitrary requirement."

We contend that, as a matter of common knowledge, division points and shops have nothing to do with local facilities to be furnished by a railway company at a given point on its line, and that even if we are wrong in this, and the court cannot deduce from the language of this statute that it has nothing to do with local facilities, yet the undisputed facts in this case are that sufficient local facilities will be left if said division point and shops are moved.

We have endeavored to demonstrate to the Court that this state statute, for all the reasons above asserted, cannot stand. It seems to us that its invalidity is apparent when it is measured and judged by the adjudications of this Court. Finally we say, with reference to the face of this statute, that it does not disclose any purpose which is within the purview of the police power of the

state; that it arbitrarily and unjustly enters a field which is prohibited by the commerce clause of the Constitution of the United States; that it has given the power to the Corporation Commission to *operate* the business of railway companies. We have searched diligently the statutes and decisions of other states and we have found no counterpart to the state statute now under consideration. It seems that all the other sovereign states of this Union have been willing for railway companies to choose their own division points and locations for their machine and repair shops. The only state that has, by statute, touched it at all, so far as we can find, is the state of Texas, and inasmuch as a decision of this Honorable Court construing that statute is solely relied upon by the appellant in this cause, we beg now to consider the Texas statute and the decision of this Honorable Court with reference to the same.

The case in which these matters were involved is the case of *International & G. N. Ry. Co.* v. *Anderson County*, 246 U. S. 424, 62 L. ed. 807. The Texas act provided that a railway company chartered by the state, or owning or operating a line within the State of Texas, should permanently maintain its general offices at the place named in its charter, and if no certain place were named therein, at such place as it should have contracted

to locate them, otherwise at such place as it should designate. Also that it should maintain its machine shops and round houses at the place where it had contracted to keep them, and that if the offices, shops or round houses were located on a line of railway in a county that had aided such railway by an issue of bonds in consideration of the location being made, then such location should not be changed, and this should apply as well to a railway that may have consolidated with another, as to those that have maintained their original organization.

In the above mentioned case, in consideration of this statute, this Honorable Court found that such statute was expressly adopted by the International Company, which was, at that time, a purely intrastate company. The legislature had said where a railway company had made a contract to locate its general offices and shops at a particular place, this contract should be binding. In other words, the legislature of Texas conceived the idea that a contract, made by a railroad company to locate its general shops and offices at a particular place for a consideration or bonus could be made binding by legislative declaration, whether or not such contract was enforceable in the courts prior to the time the state gave the contract irrefutable and unchanging validity by express legislative fiat. We are not presumptuous enough

to attempt to make our construction of this decision binding upon this Honorable Court, and especially upon the distinguished Justice who wrote the opinion, but we feel we are justified in trying respectfully to ascertain, from all the facts and circumstances in the case, and from the utterances of the learned Justice, the meaning and scope of such decision.

We may say that if a legislature declares that a contract by a railway company to locate permanently its offices and shops at a particular point for a bonus received, can never be questioned, it declares something unsupported by reason or authority, and in conflict with all adjudicated cases in the State and Federal Courts which we have been able to find. The duty of a railway company in locating its offices, its shops, its division points, etc., is conditioned and measured by the obligation which the railway company owes to the public. A railway company is a *quasi* public corporation, and the rights of the public with reference to the use and enjoyment of such railroad and its service, are always paramount to the rights of any individual or any specific community.

Ever since the case of *Texas & Pacific Ry. Co.* v. *Marshall,* 136 U. S. 393, 24 L. ed. 385, the courts have, with one accord, agreed that a contract by a railway

company, permanently to locate its offices, shops or division points at a particular town, is either absolutely void as against public policy, or voidable at the instance of the railway company which made the contract, by showing that the interests of the public and of the stockholders of the railroad demand that a removal shall be had nontwithstanding the contract. This is the concensus of all the opinions, the only dividing line between them being that in some states the contract is held absolutely void as against public policy, while in others it is held voidable at the instance of the railroad by proving the facts above suggested.

In the Marshall case above cited, Justice Miller, in his opinion, distinctly said, that notwithstanding the contract made by the railway with the people, for a bonus, to maintain its shops at Marshall, Texas, permanently, an injunction would not lie against the railway company to restrain it from moving its shops. Justice Miller clearly was of the opinion that such a contract was void on the ground of public policy; that a railway company could not barter away, for a consideration, its paramount obligation to the public. This Marshall case has been cited with approval time and again by this Honorable Court, and its scope and meaning have never, that we can find, been criticised or changed by an opinion of this

Court, and in that case Justice Miller said that notwithstanding the contract permanently to locate, eight years was a reasonable time for the railway company to remain, and this satisfied the obligation of the contract.

In *Atlanta R. Co.* v. *Camp,* 130 Ga. 6, it is distinctly held that the contract of a railroad to maintain a station permanently is subordinate to the public duties of the railroad.

In *Edwards* v. *Goldsboro,* 140 N. C. 70, it was held that a contract between a city and property owners as to the erection and location of certain public buildings was void.

In *Florida Ry. Co.* v. *State,* 31 Fla. 510, it is held that a contract of a railroad to establish depots exclusively at particular points is void.

Oklahoma has, by her decisions, placed herself in line with those states which hold this character of contract void. Commencing with the case of *Enid Right of Way and Townsite Co.* v. *Lile,* 15 Okla. 317, we quote from the syllabus of such opinion:

> "Public policy requires that a railroad company chartered by the authority of the territory, should not be permitted to limit these franchises by contract which will place it in a position where it is not free to act in the location of its railroad stations

and depot at such points as the public convenience may require. And a contract which provides that for a consideration the location of a railroad station or depot by the railroad corporation shall be at a certain point, without regard to the question of the needs of the people, or the public convenience, is against public policy."

But whether we adopt the line of authority that holds this character of contract void, or the line that holds it voidable, as above indicated, no case, we think, can be found which holds it absolutely valid and enforceable as against the interests of the public and the interests of the owners of the railroad, and yet for some strange reason the legislature of Texas in effect validated absolutely a contract which every court in the Union that has touched the question held to be void or voidable at the time made.

It seems to us that this is the real gist of the International case cited aforesaid. The learned Justice, who delivered the opinion, stressed at some length the point that the complaining railroad in that case had not only made the contract alleged to keep its office and shops at Palestine forever, but had accepted this statute in its charter, and that this acceptance by the railroad of this statute foreclosed any right it had to dispute the obligation imposed by the statute. The learned Justice, in the body of the opinion, on page 816, uses this language:

"But, furthermore, when the office-shops act was on the statute book the plaintiff in error took out a charter under general laws that expressly subjected it to the limitations imposed by law. It is said that this does not make the plaintiff in error adopt an otherwise unconstitutional statute. But even if, contrary to what we have intimated, the act could not otherwise have affected those particular corporations, it was a law upon the statute books and was far from a mere nullity, and if it was made a condition of incorporation that this restriction should be accepted, the plaintiff in error cannot complain. * * * We agree with the state courts that the condition was imposed."

We can reach no other conclusion from a careful reading of this opinion than that the paramount thought in the mind of the Justice was that when a railroad company comes into a state, and by its charter, or by express terms, agrees to live under a certain statute, that it ought not to be permitted thereafter to attack said statute.

It may be that a legislature can force a railway company to adopt and obey a statute which validates a contract declared to be absolutely bad by some courts, and declared to be the subject of absolute avoidance by all other courts, but this kind of exercise of the sovereign power certainly furnishes much food for thought.

The learned Justice further in his observations said:

"The contention was made that the legislature of Texas could not make the railroad company adopt a statute otherwise unconstitutional."

It may be that a statute which, when attacked, will be declared unconstitutional, is not, as the learned Justice said, a mere nullity on its face, and that a railway company can agree with a sovereign to obey such statute although, under attack, it might prove unconstitutional.

This idea was considered and advanced by Federal Judge Hammond in *Louisville & N. R. Co.* v. *Railroad Commission of Tennessee*, 19 Fed. 679. The learned Justice indulged in the following observations:

> "Possibly, when incorporators ask a grant of franchises to enable the company to engage in interstate commerce, and, in consideration of the grant, agree not to charge more than a certain maximum, or to establish a certain schedule of rates for the transportation of commodities carried in such commerce, they would be bound by it; but not, be it remembered, because there has been a lawful exercise by the state of a municipal power to prescribe such rates,—for that would be none the less a regulation of interstate commerce, and as such void,—but because the incorporators, as owners, with power, in the absence of paramount regulation of law, to prescribe their own rates, have established these. *Concensus facit jus.*"

It would seem that the Justice who rendered the opinion in this case now under consideration, emphasized and gave great force to the fact that the Texas statute had been adopted expressly by the complaining railroad, and that this fact ought to estop it from com-

plaint or opposition. Again in the International case heretofore cited, the Court said:

> "The acceptance of the charter by the plaintiff in error disposed of every constitutional objection but one. It is said that the restriction imposes a burden upon commerce among the states, since the road concerned has expended and now is largely engaged in such commerce. The jury found that it imposed no such burden, upon an issue submitted to them in accordance with the desire of the plaintiff in error, although not in the form that is desired. So far as the question depended upon the testimony adduced, the verdict must be accepted; and although no doubt there might be cases in which this court would pronounce for itself, irrespective of testimony, whether a burden was imposed, we are not prepared to say that in this instance the state has transcended its powers. The burden, if any, is indirect."

It seems to us that the Court intended, by this suggestion, to mean that the verdict of the jury that no direct burden was cast on commerce under the facts of the case, was binding upon the railway company, and that a verdict of the jury in a case of that kind would not be disturbed by this Court unless the law, on its face, or the facts, showed a clear and undisputed burden upon interstate commerce. Of course, this Court reserved to itself the ultimate right and power to determine, in any case, whether a burden was placed upon interstate commerce, but the Court was content to let this case now under con-

sideration rest upon the verdict of the jury on facts which do not appear of record in detail in the decision, and which, therefore, we have not the privilege of examining.

In view of the peculiar facts and condition of this International case, we feel that it cannot be cited as an apposite authority for the broad contention made here by appellants. The facts in the present case which were pertinent to the inquiry as to the validity of the Oklahoma statute, show clearly that the Oklahoma statute seriously interferes with the interstate commerce of the Frisco Railway Company. The facts in the case show that this statute, most probably, was passed to meet conditions at Sapulpa. It appears to us to be an unreasonable statute; an arbitrary statute; a discriminating statute, and that it cannot stand the test of critical judicial review. If railway companies doing interstate business are required by Federal law to run their raliroads economically and to the best interest of the public, and if they are required, under the general law, to conduct said railroads to the best interest of the public, then to such railway companies must be committed the exercise of judgment and discretion in adopting the proper methods to bring about such results. If the states are permitted to take charge of railway companies by requiring such

companies to operate through narrow, restrictive, unnecessary and unreasonable regulations, the usefulness of such railroads, as great agencies of commerce, will be impaired and, sooner or later, destroyed.

Before we finally conclude, we beg again to call the attention of the Court to the great loss which would be entailed upon the St. Louis-San Francisco Railway Company if it might be compelled to remain at Sapulpa. The expense and the conditions surrounding the whole situation are succinctly as follows:

The railway company is now maintaining two great systems of terminal facilities including round house, yards and shops, within fourteen miles of each other. Owing to the immense volume of business necessarily transacted through the terminal facilities at Tulsa, the shops and other terminal facilities there cannot be abandoned. If the shops and round house and other facilities, not having to do with business originating or received at Sapulpa are abandoned and equipment now being used at Sapulpa moved to Tulsa, there will be eliminated the following unnecessary expense now being incurred: $11,000.00 per month in the locomotive and car department, $1,614.00 per month power plant expense, $500.00 per month water expense, $14,000.00 per month light and power expense. While the affidavits introduced in evi-

dence by appellee show that in all probability the amount saved by the contemplated move will be much greater than included in the above items, it is conclusively shown that a saving of the above amounts is certain. Thus, it is seen that if the company is compelled to maintain its present shops and terminal point at Sapulpa, there will be entailed a needless expense of more than $325,000.00 per annum.

We apologize to this Honorable Court for the length of this brief. We have, in good faith, attempted to define and enforce the positions taken by us. We, therefore, submit the case, invoking the favorable judgment of Your Honors.

Respectfully submitted,

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